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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1075

ROBERT F. DEVITT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, convicted of perjury before a federal grand jury, challenges (1) the adequacy of his indictment and the trial court's failure to give certain instructions, (2) the sufficiency of the evidence, (3) the trial court's finding that his false statements were material to the grand jury's investigation, and (4) the admissibility of his grand jury testimony. He also contends that his prosecution under 18 U.S.C. 1623 rather than 18 U.S.C. 1621 violated principles of equal protection.

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of having made false declarations before a grand jury, in violation of 18 U.S.C. 1623. He was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. 1-13).

1. At trial, four Chicago tavern operators testified that during a period from 1964 through the early part of 1967 they had paid money to petitioner while he was engaged in the performance of his duties as a Chicago police officer. Thomas McCauley, part owner of the Emerald Isle Pub, testified that in early 1964, following the arrest of his bartender, he gave money to petitioner, one of the uniformed officers involved in the arrest, and stated, "See what you can do about it because its a pretty bad beef" (Tr. 33-36). Similarly Mary McCracken, owner of M & M Lake Liquor, testified that, following an altercation in her tavern, she met with petitioner, who identified himself as Sergeant Devitt, and, at his suggestion, accompanied him in the squad car in order that he might show her "some places who had had similar occurrences and what could be the results, such as revocation of licenses" (Tr. 83-86). When she inquired what could be done to avoid the loss of her license petitioner responded that he "would be happy to help * * * for a sum of money" (Tr. 86). On the following day she gave petitioner $700 (Tr. 87-89).

Johnnie Lee Davis, manager of the Inquire Lounge on Madison Street, testified that petitioner entered his lounge and told Davis that he was "taking care of Madison Street" (Tr. 140). Two weeks later petitioner entered the lounge and asked Davis if there was an envelope for him. Davis replied that he was just the manager, not the "boss" (Tr. 141). Three weeks later Davis observed petitioner parked in a squad car across the street from the lounge (Tr. 142). At the same time, a "kid" came into the lounge to buy a pint of whiskey (Tr. 143). When the bartender asked for an "ID", the "kid" responded that he didn't have one. He then picked up a glass from one of the

tables, walked out of the tavern and across the street to where petitioner had parked, and re-entered the lounge with petitioner (Tr. 143-144). Petitioner told Davis that his bartender "sold to minors" but that he "wouldn't go down" if Davis gave him $75 (Tr. 144-145). Davis refused and accompanied petitioner and the bartender, who had been placed under arrest, to the police station (Tr. 145). Subsequently, petitioner entered the lounge and, after observing women behind the bar, told Davis that women were not supposed to work there and Davis stated: "Show me the place where I could fix it so they could work behind the bar." Petitioner told Davis that it would cost $75 per month. Thereafter, the lounge ceased employing women to work behind the bar (Tr. 146). Two weeks later, Davis called the police during a fight at the tavern in which a boy was "cut up" (Tr. 147). Davis gave petitioner $350, and no arrests were made (Tr. 148). Following a subsequent robbery of a watch from a customer at the tavern, petitioner arrived and stated to Davis: "This guy said his watch cost two fifty * * *. [G]ive him $500 and they would call it square" (Tr. 149).

Donald Joras, former owner of the Parkside Tap, testified that in 1966 or 1967 there had been a disturbance at the tavern (Tr. 217-219). A police officer soon arrived and told him that the wife of one of the individuals involved in the disturbance had made a complaint, but to "[f]orget about it" (Tr. 244). On the same day, two other uniformed officers entered the tavern, one of whom was wearing a name plate bearing the name "Devitt." They told Joras that he was under arrest for failing to report the disturbance to the police (Tr. 225-226). When Joras asked the officers what they wanted, petitioner

replied, "three bills" ($300) (Tr. 226-227). Thereafter Joras gave petitioner $50. Petitioner accepted the money but stated, "I don't need your money" and "whipped out a roll" (Tr. 227).

2. Herbert Beigel, an attorney who had been assigned to investigate extortion activity before the Special February 1971 Grand Jury, testified that petitioner was called as a witness before the grand jury and was administered an oath by the foreman (Tr. 11-12). The following excerpts from the transcript of petitioner's grand jury testimony were introduced into evidence at trial (Tr. 197-198, 204-205):

Q Let me ask you this. Have you ever asked for any money from any person for any reason while in the performance of your duties as a Chicago police officer?

A Not to my knowledge. * * *

Q Did you ever accept any money?

A No.

Q Did you ever accept money at any time from any tavern owner for any reason while in the performance of your duties as a Chicago police officer?

A Not to my knowledge, no.

Q Did you ever accept any money from any employee or agent of a tavern or business while in the performance of your duties as a Chicago police officer?

A Not that I can ever recall. * * *

Q Did you ever accept any money from any tavern owner while assigned to the Austin District?

A Ever accept any money from a tavern owner while assigned--that is so far back I can't remember at all, and that is the God's truth. I can't remember.

Q You can't remember?

A No.

Q Whether you ever took a bribe or not?

A A bribe?

Q Yes.

A For what? To do what?

Q For anything.

A To overlook my official duty?

Q That is correct.

A Never took a bribe to overlook my official duty.

* * *

Q My answer to the question has got to be what would anybody give me any money for?

Q Is it yes or no?

A It would have to be not to my knowledge. I can't recall taking any money from anybody.

Q Have you ever taken money from any employee of any tavern in the Austin District?

A I can't recall ever taking any money from anybody either—boy!

Q As a Chicago police officer, have you ever at any time accepted any money from anyone to overlook a duty that you had as a Chicago police officer?

A Did I—oh, boy, 20 years. Now we are going back 20 years. Did I ever? Not that I can recall.

3. Petitioner contends that the government failed to allege and prove, and that the court failed to instruct the jury that they must find, that the oath was administered by one authorized by law to administer oaths (Pet. 7-15). As the court below noted, however, the indictment expressly alleged that petitioner made the statements "while under oath as a witness before the Special February 1971 Grand Jury" (Pet App. 2), and the government presented evidence that the oath was in fact administered by the foreman of the grand jury. That there was no allegation, proof, or instruction that the jury must find that the oath was administered by one authorized by law to administer oaths is, as the court of appeals stated, "of no consequence * * * [since] 18 U.S.C. §1623 contains no such requirement[s]" (Pet. App. 3). Moreover, the underlying premise of this contention is without substance. As indicated above, the evidence established that the oath was administered by the foreman of the grand jury. A grand jury foreman is expressly authorized to administer oaths. Rule 6(c), Fed. R. Crim. P.

4. Petitioner's contention that the government failed to prove that he knew that his testimony before the grand jury was false (Pet. 27-30) was properly rejected in the opinion of the court of appeals. We rely upon the following portion of that opinion (Pet. App. 9-10):

> Whether defendant knew at the time he testified that his statements were false may be proven by circumstantial evidence, *United States* v. *Nicoletti*, 310 F.2d 359 (7th Cir. 1962), and "generally, a belief as to the falsity of testimony may be inferred by the jury from proof of the falsity itself." *Young* v. *United States*, 212 F.2d 236, 241 (D.C. Cir. 1941 [sic]). Although the testimony of

the tavern owners did not directly establish that defendant actually remembered receiving money from them, their testimony did establish that the money was paid to the defendant while in the performance of his duties as a Chicago police officer. These witnesses testified in detail regarding veiled threats made by defendant to the effect that he would use his official position to their economic detriment unless he was paid a certain sum of money. Each witness testified that money was subsequently paid to the defendant. Defendant testified in his own behalf and denied accepting money from any of the four tavern owners. On cross examination, he testified that if he had ever "shaken down any taverns", he would remember it. The jury apparently concluded that, contrary to his testimony at trial, defendant had accepted money from the four tavern owners and that he remembered doing so. We find the circumstantial evidence here substantially greater than that presented in *United States* v. *Clizer*, 464 F.2d 121 at 125 (9th Cir. 1971), and viewed in the light most favorable to the appellee, sufficient to prove beyond a reasonable doubt that at the time defendant testified before the grand jury he knew his testimony to be false.

5. Petitioner also claims (Pet. 15-16) that the trial court erred in failing to include in one of its instructions that the jury must find that petitioner accepted money from certain named persons while "in the performance of his duties as a Chicago police officer." But the instruction in issue (see Pet. 15) refers to the testimony that petitioner accepted bribes in the performance of his duties as a police officer. Thus, a

finding that the testimony was true would necessarily include a finding as to the element petitioner claims was omitted from the instruction. In any event, the court of appeals properly rejected this claim, holding that the instructions viewed in their entirety repeatedly advised the jury that such a finding was a prerequisite to a guilty verdict (Pet. App. 3-4).[1]

6. Petitioner's contention that the court erred in concluding that his false statements were material to the grand jury investigation (Pet. 20-27) was also properly rejected by the court of appeals, which stated (Pet. App. 6-7):

> False testimony before the grand jury is material if it "has the natural effect or tendency to impede, influence or dissuade the grand jury from pursuing its investigation. *United States* v. *Stone*, 429 F.2d 138, 140 (2nd Cir., 1970), and cases cited therein. Moreover, if the false statement "potentially interferes with the grand jury's line of inquiry, materiality is thereby established even though the perjured testimony does not actually impede the investigation." *United States* v. *Wesson*, 478 F.2d 1180, 1181 (7th Cir. 1973). See also, *Vitello* v. *United States*, 425 F.2d 416, 424 (9th Cir. 1970); *United States* v. *Henderson*, 185 F.2d 189, 191 (7th Cir. 1950).

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[1]Petitioner's reliance (Pet. 16, n. 9) on *Cool* v. *United States*, 409 U.S. 100, is misplaced. *Cool* involved an instruction concerning accomplice testimony favorable to the defendant, in which the trial court charged that such testimony could only be believed if the jury found it to be true "beyond a reasonable doubt." This Court held that the instruction placed the burden of proof on the defendant in violation of the principle of *In re Winship*, 397 U.S. 358. The instruction of which petitioner complains does not, as shown above, have that effect.

> In the instant case, the grand jury was engaged in an investigation of possible extortionate conduct by certain Chicago Police Department personnel in violation of the Hobbs Act. Defendant's false declarations potentially interfered with and impeded that investigation insofar as defendant's false answers rendered further inquiry on the subject a meaningless exercise. Had defendant answered honestly, the grand jury would have been advised that he had, in fact, accepted money from tavern owners while in the performance of his duties as a Chicago police officer. The grand jury would then have been in a position to determine the identity of other extortion victims, if any, who had not previously been identified. Potentially, honest responses to the questions asked of defendant might have led to a determination of the identity of other police officers, if any, engaged in similar practices.

Nor is there merit to petitioner's allegation (Pet. 24-25) that the grand jury acted in bad faith because its members asked questions concerning "matters as to which the statute of limitations pertaining to substantive criminal prosecution had expired" and sought information that had already been obtained from sources other than petitioner.[2] Petitioner's contention misconceives the role of the grand jury. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose in-

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[2]While the grand jury had heard testimony from certain persons that petitioner had accepted bribes, it was, of course, not clear that petitioner's conduct was limited to these witnesses. As the court of appeals observed (Pet. App. 7), had petitioner given truthful answers before the grand jury, additional extortion victims might have been identified.

quiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation * * *" *United States* v. *Calandra*, 414 U.S. 338, 343 (quoting *Blair* v. *United States*, 250 U.S. 273, 282). The grand jury has "wide latitude to inquire into violations of criminal law" (*ibid.*). Specifically, "the grand jury may seek information which predates the applicable limitation," and its inquiry may include questions seeking answers that would lead to a "more fruitful investigation" (Pet. App. 8). See, *e.g.*, *United States* v. *Cohn*, 452 F.2d 881 (C.A. 2).

7. Petitioner also contends (Pet. 30-32) that the admission of his grand jury testimony violated his right to due process, because a local police regulation in effect at the time of his testimony, requiring suspension or dismissal of an officer for failure to give evidence before a grand jury, was subsequently declared unconstitutional. The court of appeals, relying on *United States ex rel. Annunziato* v. *Deegan*, 440 F.2d 304 (C.A. 2), rejected this contention (Pet. App. 12-13):

> * * * Had defendant admitted extorting money from tavern owners, neither his testimony nor the fruits thereof could have been used against him in a subsequent prosecution * * *. Had he exercised his Fifth Amendment privilege he could have attacked the legality of any subsequent disciplinary action against him * * *. But we find nothing * * * which grants a witness before the grand jury the third alternative which, in substance, is proposed by the defendant in the instant case: the right under such circumstances to knowingly make a false material declaration while testifying under oath before a grand jury.

See *Bryson* v. *United States*, 396 U.S. 64; *United States* v. *Knox*, 396 U.S. 77; *Robinson* v. *United States*, 401 F.2d 248 (C.A. 9); *United States* v. *Orta*, 253 F.2d 312 (C.A. 5).

8. Petitioner's contention (Pet. 17-20) that he was denied equal protection of the law because he was indicted under 18 U.S.C. 1623, proscribing false declarations before a grand jury or court, rather than 18 U.S.C. 1621, the general perjury statute, is without merit. "Congress could rationally conclude that cases involving false testimony before a court or grand jury are different in specie from and more detrimental to the common cause than other instances of false testimony and decide to punish them differently, as well as provide for a different standard of proof to apply in such a prosecution." *United States* v. *Koonce*, 485 F.2d 374, 378 (C.A. 8); see *United States* v. *Ruggiero*, 472 F.2d 599, 606 (C.A. 2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.